FILED
FEB 25 1957
JOHN T. FEY, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1956

Nos. 778 & 779

AIRCOACH TRANSPORT ASSOCIATION, INC.,
QUAKER CITY AIRWAYS, INC.,
*Petitioners,*

v.

AMERICAN AIRLINES, INC., ET AL.,
NATIONAL AIRLINES, INC., ET AL.,
*Respondents.*

INDEPENDENT MILITARY AIR TRANSPORT ASSOCIATION,
*Petitioner,*

v.

AMERICAN AIRLINES, INC., ET AL., and
NATIONAL AIRLINES, INC., ET AL.,
*Respondents.*

## MOTION TO DEFER CONSIDERATION OF PETITIONS FOR WRITS OF CERTIORARI

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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INDEPENDENT MILITARY AIR TRANSPORT ASSOCIATION,
*Petitioner,*

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NATIONAL AIRLINES, INC., ET AL.,
*Respondents.*

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## MOTION TO DEFER CONSIDERATION OF PETITIONS FOR WRITS OF CERTIORARI

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*To the Honorable The Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:*

Come now the Aircoach Transport Association, Inc., and the Independent Military Air Transport Associa-

tion (hereinafter called Petitioners) by their attorneys and respectfully move this Honorable Court to defer consideration of the Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, filed herein February 16, 1957, until sixty (60) days after the final decision of the Civil Aeronautics Board in the *Large Irregular Air Carrier Investigation,* C.A.B. Docket No. 5132 *et al.,* (the date on which any authorization issued in such *Investigation* would normally take effect) and in support of said Motion respectfully state as follows:

I

The questions presented to this Honorable Court in the Petitions for Writs of Certiorari, filed herein February 16, 1957, arose as a result of an opinion and order of the Civil Aeronautics Board, dated November 15, 1955, in the *Large Irregular Air Carrier Investigation,* C.A.B. Docket No. 5132 *et al.,* wherein the Civil Aeronautics Board granted certain enlarged operating rights to air carriers which are members of your Petitioners' Associations.

II

The opinion of the United States Court of Appeals for the District of Columbia Circuit entered on July 19, 1956, reversed the opinion and order of the Civil Aeronautics Board and remanded the case to the Board for further proceedings. Specifically, the Court of Appeals held, among other things, that the Civil Aeronautics Board should make additional findings of fact to support its opinion and order in C.A.B. Docket No. 5132 *et al.*

## III

The opinion and order of the Civil Aeronautics Board, dated November 15, 1955, granted the members of your Petitioners' Associations *interim* operating authority pending final decision by the Board with respect to applications for Certificates of Public Convenience and Necessity or for exemption orders filed by members of your Petitioners' Associations in C.A.B. Docket No. 5132 *et al.* On December 12, 1956, the Civil Aeronautics Board (Respondent below) filed in the United States Court of Appeals for the District of Columbia Circuit a motion to stay the issuance of the opinion and certified copy of judgment of the Court of Appeals until sixty (60) days after the final decision of the Civil Aeronautics Board in C.A.B. Docket No. 5132 *et al.* This motion, which was concurred in by all parties, was granted by the United States Court of Appeals for the District of Columbia Circuit on December 21, 1956. A copy of the motion dated December 12, 1956, together with a copy of the order of the Court of Appeals, dated December 21, 1956, is set forth in the Appendix herein.

## IV

Your Petitioners have no way of knowing in what respect, if any, the final decision of the Civil Aeronautics Board in C.A.B. Docket No. 5132 *et al.* may adversely affect the operating rights granted to members of your Petitioners' Associations by the order of the Board dated November 15, 1955. The matter is further complicated by virtue of the fact that three members of the Civil Aeronautics Board, who voted in favor of the operating rights granted members of your Petitioners' Associations on

November 15, 1955, have now left the Civil Aeronautics Board and have been replaced by new members who presumably are not entirely familiar with the proceeding in C.A.B. Docket No. 5132 *et al.* While there is every possibility that the final decision of the Civil Aeronautics Board *may* render moot the opinion and decision of the court below, your Petitioners have no means *now* of knowing that to be the case. Accordingly, petitions for certiorari were timely filed herein by your Petitioners in order to preserve their rights and standing before this Honorable Court.

When the Civil Aeronautics Board issues its final decision in C.A.B. Docket No. 5132 *et al.*, it is quite possible that the Board may make additional findings of fact which will satisfy the opinion of the United States Court of Appeals for the District of Columbia Circuit, dated July 19, 1956, and thereby render moot one of the principal issues raised in the Petitions for Certiorari filed herein February 16, 1957. On the other hand, it is possible that the final opinion of the Civil Aeronautics Board may not make such additional findings of fact or may otherwise change the legal posture of the case in such a manner as to warrant consideration by this Honorable Court of the Petitions for Writs of Certiorari filed herein February 16, 1957.

## V

There is every indication that the Civil Aeronautics Board will hand down its final decision in C.A.B. Docket No. 5132 *et al.* within the reasonably near future. The final initial decision of the Examiners in the case was served January 10, 1957, and briefs in support of the initial decision or in opposition thereto

must be filed with the Civil Aeronautics Board by March 11, 1957. The Chief Examiner of the Civil Aeronautics Board has advised all parties that the case will be assigned for oral argument before the Civil Aeronautics Board shortly after March 11, 1957. Under these circumstances, the granting of this motion will not prejudice any party but will merely preserve your Petitioners' legal rights in this Honorable Court until such time as a final decision is rendered by the Civil Aeronautics Board in C.A.B. Docket No. 5132 *et al.*, and thereby avoid the need for consideration by this Court of a matter which *may* be rendered moot.

WHEREFORE, your Petitioners respectfully pray that this Honorable Court defer consideration of the Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, filed herein February 16, 1957, until sixty (60) days after the final decision of the Civil Aeronautics Board in the *Large Irregular Air Carrier Investigation*, C.A.B. Docket No. 5132 *et al.*, and grant your Petitioners such other and further relief as the premises shall require.

Respectfully submitted,

ALBERT F. BEITEL
JOHN H. PRATT
905 American Security Bldg.
Washington 5, D. C.
*Counsel for Petitioners in No. 778*

COATES LEAR
Cafritz Building
Washington, D. C.

THEODORE I. SEAMON
Woodward Building
Washington, D. C.
*Counsel for Petitioner in No. 779*

Dated: February 25, 1957

**Proof of Service**

The undersigned attorneys for the Petitioners herein, who are members of the Bar of the Supreme Court of the United States, hereby certify that on February 25, 1957, they caused to be served copies of the foregoing Motion upon the persons listed below by mailing copies, in duly addressed envelopes, with first class postage prepaid, as follows:

Honorable J. Lee Rankin
Solicitor General of the United States
Department of Justice
Washington, D. C.

Honorable Herbert J. Brownell
Attorney General of the United States
Department of Justice
Washington, D. C.

Howard Westwood, Esq.
Covington & Burling
Union Trust Building
Washington, D. C.

Richard A. Fitzgerald, Esq.
920 Southern Building
Washington 5, D. C.

Daniel M. Friedman, Esq.
Attorney
Department of Justice
Washington 25, D. C.

Franklin M. Stone, Esq.
General Counsel
Civil Aeronautics Board
Washington 25, D. C.

O. D. Ozment, Esq.
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Atlanta 3, Georgia

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Washington 6, D. C.

ALBERT F. BEITEL
*Attorney for Independent Military Air Transport Association*

THEODORE I. SEAMON
*Attorney for Aircoach Transport Association, Inc.*

## APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 13,044, 13,045, 13,048, 13052, 13,054, 13,061, 13,063, 13,064, 13,068, 13,116, 13,117, 13,118, 13,120, 13,121

AMERICAN AIRLINES, INC., ET AL., *Petitioners,*

v.

CIVIL AERONAUTICS BOARD, *Respondent,*

AIRCOACH TRANSPORT ASSOCIATION,
QUAKER CITY AIRWAYS, INC.,
INDEPENDENT MILITARY AIR TRANSPORT ASSOCIATION,
CAPITOL AIRWAYS, INC.,
*Intervenors.*

### Motion for Further Stay of Judgment

Respondent, with the concurrence of all other parties herein and subject to the right of petitioners to move for sooner issuance thereof only on grounds of undue delay in the Board's proceeding, moves the Court for entry of an order staying the issuance of the opinion and certified copy of judgment in lieu of mandate until sixty days after the Board renders final decision in the *Large Irregular Air Carrier Investigation,* C.A.B. Docket No. 5132, *et al.* (the date on which any authorizations issued in such *Investigation* normally would take effect). In support of this motion, respondent represents:

1. The Court has heretofore stayed issuance of the judgment herein to and including December 28, 1956, pending completion of proceedings by the Board pursuant to the Court's opinion and/or the filing of petitions for writs of certiorari by the intervening supplemental air carriers.

2. The position of petitioners and the intervenor on petitioners' side with respect to the further proceedings which should be had before the Board, and with respect to the relief here requested, is set forth in the letter annexed hereto as Appendix A.

3. The positions of the intervenors on respondent's side with respect to the relief requested are set forth in the letters annexed here as Appendices B and C.

4. This motion does not constitute any acquiescence by respondent with the views and contentions of any of the private parties herein. If the motion is granted, respondent will consider itself free at all times to take such interim or final action as may be required under existing circumstances and as is consistent with law, including such notice to the Court and to the parties as may be required.

5. Prompt action on this motion is respectfully requested so that the proper course of action by all parties may be determined.

Respectfully submitted,

.....

DANIEL M. FRIEDMAN
Attorney
Department of Justice
Washington 25, D. C.

.....

FRANKLIN M. STONE
General Counsel
Civil Aeronautics Board
Washington 25, D. C.
*Attorneys for Respondent*

We concur:

.....

HOWARD C. WESTWOOD
Attorney for the petitioners and the intervenor
National Airlines, Inc.

.....

ALBERT F. BEITEL
Attorney for Aircoach Transport Association and
Quaker City Airways, Inc., Intervenors

.....

THEODORE I. SEAMON
Attorney for Independent Military Air Transport
Association and Capital Airways, Inc.,
Intervenors

Dated: December 12, 1956

# APPENDIX A

COVINGTON & BURLING
701 UNION TRUST BUILDING
WASHINGTON 5, D. C.

December 4, 1956

FRANKLIN M. STONE, ESQ.
General Counsel
Civil Aeronautics Board
Washington 25, D. C.

Re: American Airlines, Inc., *et al.*, Petitioners, v. Civil Aeronautics Board, Respondent, D.C. Cir. No. 13,044 *et al.*

Large Irregular Air Carrier Investigation, Docket No. 5132 *et al.*

Dear Mr. Stone:

As a result of the decision of the Court of Appeals in the above matter and the determination of the Board not to seek certiorari, there is now before the Board the question of what further proceedings should be held in the light of the Court's opinion.

In the interest of an expeditious disposition of this proceeding, of avoiding further legal complications and of reducing the work load on the Board, its staff and other parties to the case, all Petitioners and National Airlines, Inc., Intervenor, in the above court cases, suggest that the Board adopt the following procedure:

The final disposition of this longest and most complex of Board proceedings will soon be at hand. Briefs were submitted to the Examiners some four months ago. It is reasonable to expect that the Examiners' Initial Decision will be rendered in the near future and that oral argument will be heard on the final phase of this proceeding in the early part of next year.

Hence, with the ultimate disposition of this proceeding so near, it would appear to be highly impractical and unnecessary for the Board to engage in further procedures looking towards an interim authorization for the supplemental air carriers. The life of such an authorization would be relatively short and, apart from the many procedural problems that would be involved in such an approach, there is, of course, the very real and serious legal question of whether under present circumstances the necessary statutory findings for such an exemption could be made without further hearing. As a matter of administrative discretion—and we think as a matter of due process—the petitioners should be given an opportunity to be heard, especially in view of the fact that there is now available actual experience with operations under the prior interim authorization, which is most pertinent to the tatutory issues. Under the circumstances, the most reasonable and equitable approach would be to withhold any further interim action, and decide this case *finally* on the merits of the various carriers' applications which will soon be before the Board for decision. In this way the fitness of the applicants, the number of carriers to be authorized and the permanent form and scope of their authority can be resolved at one time. The usual opportunities to brief and argue these issues to the Board would be accorded all parties.

Adoption of this procedure would permit the Board to focus on the ultimate issues in this proceeding and would give the new members of the Board greater opportunity to familiarize themselves with the case and the permanent aspects of the proceeding without the necessity of attempting to deal with the problem of a further temporary authorization.

In the event the procedure suggested above is adopted, Petitioners would agree to further stays of issuance of the opinion and certified copy of judgment in lieu of

mandate by the Court of Appeals pending the issuance of the Board's final decision in the proceeding below. Petitioners and the Board would reserve the right to seek a dissolution of the stay in the event the Board's final decision should be long delayed or deferred.

In short the adoption of the above method of proceeding would eliminate further piece meal handling of this case, would look to a final settlement of the irregular carrier problem on its merits and would in no way be harmful to the public or the supplemental air carriers.

I have been authorized to submit the foregoing on behalf of all petitioners (and the intervenor, National Airlines, Inc.) in the court case. Copies are being sent to Messrs. Seamon, Lear and Beitel.

Respectfully submitted,

/s/ HOWARD C. WESTWOOD
Howard C. Westwood
*Attorney for*
*American Airlines, Inc.*

# APPENDIX

# APPENDIX

## APPENDIX B

LAW OFFICES OF
THEODORE I. SEAMON
WOODWARD BUILDING
WASHINGTON 5, D.C.

Telephone
Republic 7-8040

Cable Address
"Wilbersea"

7 December 1956

FRANKLIN M. STONE, ESQ.
General Counsel
Civil Aeronautics Board
Washington 25, D. C.

Re: American Airlines, Inc., *et al.*, Petitioners, v. Civil Aeronautics Board, Respondent, D. C. Cir. No. 13,044 *et al.*

Large Irregular Air Carrier Investigation, Docket No. 5132 *et al.*

Dear Mr. Stone:

As counsel for Intervenors, Independent Military Air Transport Association and Capitol Airways, Inc., in the above captioned proceeding, we have been served with copy of letter dated December 4, 1956 addressed to you by counsel for American Airlines, Inc. on behalf of all Petitioners (and the Intervenor, National Airlines, Inc.) in the aforesaid Court proceeding.

It is our understanding that the procedure suggested in Mr. Westwood's letter contemplates, subject to the approval of the Court, agreement to further stay of transmission of certified copies of the opinion and judgment by the Court of Appeals, pending the issuance of the Board's final decision in the proceeding below.

This is to advise that on behalf of the Intervenors represented herein, we have no objection to and are in accord with continuing stay, as suggested. In agreeing with the procedure, we do not necessarily subscribe to all of the considerations and representations set forth in Mr. Westwood's letter.

This concurrence is, of course, without prejudice to any position which we may take before the Board or in the Courts, with respect to policy or legal issues, including the right of appeal to the Supreme Court from the subject decision of the Court of Appeals.

Respectfully,

/s/ THEODORE I. SEAMON
Theodore I. Seamon

/s/ COATES LEAR
Coates Lear
*Attorneys for Independent Military Air Transport Association & Capitol Airways, Inc.*

# APPENDIX C

LAW OFFICES
MORRIS, PEARCE, GARDNER & PRATT
AMERICAN SECURITY BUILDING
WASHINGTON 5, D.C.

December 7, 1956

FRANKLIN M. STONE, ESQ.
General Counsel
Civil Aeronautics Board
Washington 25, D. C.

Re: *American Airlines* v. *Civil Aeronautics Board*,
D. C. Cir. No. 13,044

Dear Mr. Stone:

As counsel for intervenors on the side of respondent in the above-mentioned case, we have received a copy of the letter dated December 4, 1956, which Howard C. Westwood, Esq., counsel for petitioner, addressed to you.

We would favor a further stay of the transmission of certified copies of the opinion and judgment of the Court until the Board finally decides the *Large Irregular Carrier Investigation*, C.A.B. Docket No. 5132. However, we do not believe that such a stay should be combined with a grant of authority to petitioner to seek a dissolution of the stay, as proposed in the third paragraph on page 2 of Mr. Westwood's letter.

It must, of course, be understood that our concurrence in a request to stay the transmission of certified copies of opinion and judgment is without prejudice to our right to file a petition for certiorari in the case, and to take such

action in the proceeding before the Board as we deem proper.

Sincerely yours,

/s/ Albert F. Beitel
Albert F. Beitel

/s/ John H. Pratt
John H. Pratt
*Attorneys for*
*Aircoach Transport Association*
*Quaker City, Airways, Inc.*

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Nos. 13,044, etc.—13,121,

American Airlines, Inc., et al., v. C. A. B.

Before: Prettyman, Wilbur K. Miller and Fahy, Circuit Judges, in Chambers.

**Order**

Upon consideration of respondent's motion for entry of an order staying issuance of the opinion and certified copy of judgment of the Court in the above cases until sixty days after the final decision of the Board in the Large Irregular Air Carrier Investigation, C.A.B. Docket No. 5132, et al., and it appearing that the other parties to these petitions for review concur in said motion, it is

Ordered by the Court that the aforesaid respondent's motion be, and it is hereby, granted. Respondent will notify the office of the Clerk of this Court of the final decision of the Board in the Large Irregular Air Carrier Investigation.

Per Curiam.

Dated: December 21, 1956.

Office - Supreme Court, U.S.
FILED
MAR 14 1957
JOHN T. FEY, Clerk

Nos. 778, 779

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1956

AIRCOACH TRANSPORT ASSOCIATION, INC., QUAKER CITY AIRWAYS, INC., *Petitioners*,

v.

AMERICAN AIRLINES, INC., ET AL., *Respondents*.

INDEPENDENT MILITARY AIR TRANSPORT ASSOCIATION, *Petitioner*,

v.

AMERICAN AIRLINES, INC., ET AL., *Respondents*.

*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR RESPONDENTS IN OPPOSITION AND OPPOSITION TO MOTION TO DEFER.

HOWARD C. WESTWOOD
Covington & Burling
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25 Broadway
New York, New York

JOHN T. LOBOE
ROBERT L. STERN
WILLIAM M. DICKSON
Mayer, Friedlich, Spiess, Tierney, Brown & Platt
231 South LaSalle Street
Chicago, Illinois
*Attorneys for Respondents*

McCORMICK & HENDERSON, INC., CHICAGO, ILL.

# INDEX.


| | PAGE |
|---|---|
| Opinion below | 2 |
| Jurisdiction | 2 |
| Question presented | 2 |
| Statute involved | 3 |
| Statement | 3 |
| Argument | 7 |
| A. Opposition to petitions for writs of certiorari | 7 |
| B. Opposition to motion to defer consideration | 13 |
| Conclusion | 13 |


## CITATIONS

### CASES


| | |
|---|---|
| American Airlines, Inc., et al. v. Civil Aeronautics Board, 231 F. 2d 483 (C.A.D.C.) | 10 |
| American Broadcasting Co. v. Federal Communications Commission, 179 F. 2d 437 (C.A.D.C.) | 7 |
| American Construction Co. v. Jacksonville T. & K. R. Co., 148 U.S. 372 | 12 |
| Florida v. United States, 282 U.S. 194 | 7 |
| Gospel Army v. Los Angeles, 331 U.S. 543 | 12 |
| Saginaw Broadcasting Co. v. Federal Communications Commission, 96 F. 2d 554 (C.A.D.C.), cert. denied, 305 U.S. 613 | 7 |
| United States v. Carolina Freight Carriers Corp., 315 U.S. 475 | 7 |
| United States v. Pierce Auto Freight Lines, 327 U.S. 515 | 7 |

PAGE

STATUTES

Civil Aeronautics Act of 1938, 52 Stat. 977 et seq., as amended, 49 U.S.C. 401 et seq.:

Section 401(a) [49 U.S.C. 481(a)] ..... 2, 3

Section 416(b) [49 U.S.C. 496(b)] .....2, 3, 5, 6, 7, 8

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1956

---

**No. 778**

AIRCOACH TRANSPORT ASSOCIATION, INC., QUAKER CITY AIRWAYS, INC.,

*Petitioners,*

v.

AMERICAN AIRLINES, INC., ET AL.,

*Respondents.*

---

**No. 779**

INDEPENDENT MILITARY AIR TRANSPORT ASSOCIATION,

*Petitioner,*

v.

AMERICAN AIRLINES, INC., ET AL.,

*Respondents.*

---

*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## BRIEF FOR RESPONDENTS IN OPPOSITION AND OPPOSITION TO MOTION TO DEFER.

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**Since the petitions in Nos. 778 and 779 involve the same case and the same question, this brief in opposition is addressed to both petitions.**

## OPINION BELOW.

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Petition, No. 779, pp. 1a-17a) is officially reported in 235 F. 2d 845.

## JURISDICTION.

The judgment of the Court of Appeals was entered July 19, 1956 and petitions for rehearing were denied by order entered September 19, 1956. The petitions for writs of certiorari were filed February 16, 1956 pursuant to an order of this Court entered December 12, 1956 extending the time for filing of such petitions. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 49 U.S.C. 646(f).

## QUESTION PRESENTED.

Section 401(a) of the Civil Aeronautics Act provides that an air carrier can engage in air transportation only in accordance with authorization in a certificate of public convenience and necessity granted by the Civil Aeronautics Board. Section 416(b) of the Act provides that the Board may exempt any air carrier or class of air carriers from this (or any other) requirement of Title IV of the Act upon finding that enforcement of such requirement would be an "undue burden" on such carrier or carriers "by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest." The only question decided below adversely to petitioners, and therefore the only question petitioners can present to this Court, is whether, in granting such an exemption, the Board made the findings required by Section 416(b).

## STATUTE INVOLVED.

Sections 401(a) and 416(b) of the Civil Aeronautics Act, pertinent portions of which are referred to above, are set forth in full in the appendix to the petition in No. 778 at pages 22 and 23, and in the appendix to the petition in No. 779 at pages 18a and 20a.

## STATEMENT.

This case arose from the *Large Irregular Air Carrier Investigation* (C.A.B. Docket No. 5132, et al.) which is still being conducted by the Civil Aeronautics Board. Large irregular air carriers had previously been exempted from the certificate requirement of the Act to the extent necessary to enable them to engage in non-scheduled air transportation with large transport-type aircraft.[1] Numerous and significant developments with respect to the large irregulars had arisen since completion of a former Board proceeding as to those carriers. (R. 41458). Many of them had been operating in a manner which presented serious problems of law enforcement, necessitating numerous compliance proceedings by the Board. For these and other reasons the Board instituted the Investigation, to which all large irregulars were made parties, in order to determine what, if any, operating authority such carriers should continue to enjoy, to which carriers such authority should be granted, and whether they should be certificated or exempted. (R. 41458-41461).

Mid-way the evidentiary hearing in the Investigation, the Board directed the Examiners conducting such hearing to suspend the taking of evidence relative to the "fitness"

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[1] The exemption did not extend to service within Alaska or in international passenger operations.

of individual large irregulars, to receive such further evidence as the parties desired to offer on the general issue of the need for the services of the non-scheduled carriers (the "public interest" questions), and then to render a report on the latter to the Board. It was contemplated that the hearings on "fitness" would be resumed later in the light of such action as the Board might thereafter take. (R. 43934-43937).

The Examiners carried out the Board's instructions, and filed their report. (R. 45934). The "public interest" questions were then briefed and argued to the Board. While considering the Examiners' report, the Board directed the Examiners to resume the hearing on the "fitness" issues. (R. 49312). While the hearings were still in progress, the Board rendered an opinion which discussed the need for the services of the large irregulars, and concluded that the Board's future policy would be not to confine such carriers to non-scheduled transportation but to permit them to engage in plane load charter service on an unlimited basis, and in individually ticketed or waybilled service on flights (scheduled or not, at the carrier's option) not exceeding ten per month for each carrier between any particular pair of points.[2] (R. 48528, *et seq.*). The opinion to this point was framed entirely in terms of action to be taken upon final disposition of the proceeding.

After arriving at this conclusion, the Board included, toward the end of the opinion, one paragraph which gave rise to this case. (R. 48563). This paragraph states that the Board would wait until the end of the Investigation to decide whether the new authority would be granted by certification or by exemption from the Act. Then it states

---

[2] This policy would not be applicable to service within Alaska, and would not apply, as to passengers, in international operations.

that, pending that decision, "we see no reason to withhold the enlarged operating authority from this class of carriers." There follows a very brief discussion saying that about thirty of the carriers had not yet been heard in the Investigation on the question of their fitness to receive future authority, that this would take "a considerable period of time", and that to require the carriers to await the conclusion of the Investigation "would constitute an undue burden" upon them. It was concluded, therefore, that an immediate temporary exemption would be issued to all of the carriers (with exceptions not here material) "to operate within the scope of the new policy."

Then, at the very end of the opinion, a set of ultimate findings was entered. The third of these findings named each of the irregular carriers to be exempted, and stated that until final decision in the Investigation enforcement of the Act, insofar as it would prevent each such carrier from engaging in the specified transportation, "would be an undue burden on each of the persons (*i.e.*, the named carriers) by reason of the limited extent of, and the unusual circumstances affecting, its operations and is not in the public interest." (R. 48566). This it will be noted merely repeated the words of Section 416(b) of the Act.

Various of the certificated scheduled air carriers and passenger-carrying railroads had participated in the Investigation before the Board as intervenors. Most of these parties filed with the lower court petitions to review the foregoing exemption order. As a result of a pre-hearing order, certain questions raised in the petitions were briefed and argued to the court, while certain other questions—principally those requiring review of the evidentiary record—were reserved for later disposition if that became necessary. Among the questions thus presented was

whether in purporting to grant an exemption of the scope and nature involved in its order, the Board made the findings required by Section 416(b).

The lower court decided this question in the negative, and the exemption order was reversed and remanded to the Board for further proceedings. Only in respect to this question of the adequacy of the Board's findings to support its order of exemption did the court below rule adversely to the petitioners.

The issuance of judgment of the lower court has been stayed with the concurrence of all parties, until final determination by the Board of the main proceeding, subject to the right of respondents here to move for the issuance of judgment if the Board's proceedings are unduly delayed. The initial decision by the trial examiners has been issued, and the parties are presently preparing their briefs to the Board, although the dates for filing briefs and for oral argument have been postponed until a newly appointed Board member is confirmed. (Notice of Chief Examiner, February 25, 1957, Docket No. 5132, *et al.*)

The Solicitor General has not petitioned for certiorari on behalf of the Board.[3]

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[3] In this connection, this Court should be advised of an inaccuracy in the petition in No. 778 (pp. 18-19). It is stated that the petitioners there believe that the Board has not petitioned for certiorari because of the issuance of the stay of judgment by the lower court. The petition states that the Board "probably feels that it need take no action, because its order will not be set aside by the Court." The fact is, however, that in the Board's motion for a stay, dated October 31, 1956, (p. 3) it stated that it did not intend to petition for certiorari. The papers prepared in connection with the stay finally granted were not filed until December, 1956. See Appendices to Motion to Defer. Thus, the decision not to petition for certiorari had been made long before this stay was granted or agreed upon.

## ARGUMENT.

### A. Opposition to petitions for writs of certiorari.

1. Section 416(b) of the Civil Aeronautics Act provides that the Board may exempt air carriers or classes of air carriers from other provisions of the Act's Title IV (Air Carrier Economic Regulation) if, and only if, it can and does find that enforcement of such other provision

> "is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest."

It is not sufficient that the agency merely parrot the bare words of the statute in an over-all ultimate conclusion. *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 533; *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475; *Florida* v. *United States*, 282 U.S. 194; *American Broadcasting Co.* v. *Federal Communications Commission*, 179 F. 2d 437, 444 (C.A.D.C.); *Saginaw Broadcasting Co.* v. *Federal Communications Commission*, 96 F. 2d 554 (C.A.D.C.), cert. denied, 305 U.S. 613. Basic or subsidiary findings which show that there is a reasonable basis for the conclusion must also be made. Without such findings, the reviewing court is unable to determine whether the agency action meets the statutory requirements. Under such circumstances judicial review would "indeed become a perfunctory process." *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, 489.

After carefully analyzing the Board's findings, the court below unanimously found that the Board's order contained

> "a conclusion stated in the language of the statute, but the order contains no findings to support that conclusion." (Petition, No. 779, p. 13a).

The opinion continued:

> "We have examined the opinion and the order with care, but we cannot ascertain from them what the Board deems to be the limited extent of the operations of the supplemental carriers which would make a certification an undue burden on the carriers, nor can we determine what unusual circumstances affecting the operations of the supplemental carriers would make certification an undue burden on these carriers. Neither can we ascertain why the Board is of opinion that the certification of these supplemental carriers is not in the public interest." (*Id.*, at 13a-14a).

Since Section 416(b) admittedly requires findings on these points, the court held that the Board's exemption order could not stand.

The fact is that the only reference to these statutory considerations appears in the ultimate finding of the Board which quoted the language of Section 416(b). It can hardly be denied that the lower court was correct when it held:

> "To validate an order of exemption the Board must comply with the statute; *i.e.*, it must find what the statute requires it to find, not in conclusory fashion in the statutory language but in such fashion that a reviewing court can test the validity of the finding." (*Id.*, at 16a).

Thus, the only question in the case is whether the lower court erred in holding that it could not discover, from the Board's opinion and order, just what the Board meant to regard as "limited extent" of operations, or "unusual circumstances" affecting operations, or "public interest" in not enforcing the certificate requirement of the Act.

Neither in the court below nor in their petitions here did or could petitioners point to any explanatory subsidiary findings on these matters. There are none. Petitioners in No. 779 attempt to supply the deficiency in the Board's order of exemption through the same device used in their briefs to the court below (Petition, p. 14). They try to construct findings to support the exemption by reference to a number of unrelated statements taken from different parts of the Board's opinion which made no reference to "unusual circumstances" or "limited extent of operations", and which did not discuss the exemption at all, but only the Board's future policy. To pull together these separate statements made in different contexts as findings with respect to "unusual circumstances" and "limited extent of operations" would be to recast the Board's opinion so as to produce findings which the Board itself never made. The court below rejected this argument (Petition, No. 779, pp. 15a-16a), concluding that:

> "there is nothing to indicate upon what facts or findings the Board based its conclusion that a requirement of certification would be an undue burden upon these carriers. The opinion and the order leave us at a complete loss upon that subject."

All that could be told from the Board's opinion and findings was that the Board's majority deemed it an "undue burden" for implementation of the future policy of the Board to await further steps in the Investigation. Whether this alleged burden was deemed to arise from unusual circumstances affecting operations or from the limited extent of operations, or some combination of the two, or just from some fortuitous circumstance it was quite impossible to tell. Further confusion as to the Board's meaning arose from its having made its ultimate finding specifically applicable to each one of the carriers exempted, whereas its

earlier one-paragraph discussion of the exemption dealt with the exemptees *en masse*. In fact, the Board had not taken any evidence as to many of these carriers, and obviously could not have made a specific finding as to each of them.

Even on petitioners' theory this case involves nothing but an interpretation of the Board's findings, which requires an analysis of the very complicated facts of this case and of the proceeding whence it arose. That is a task properly left to the lower court and certainly should not occupy the time of this Court. Involved is neither conflict of decision among lower courts nor the establishment of any general principle of law beyond the familiar and salutary principle that an agency, in its findings, must disclose what the statute requires in a manner intelligible to a reviewing court.

2. Neither petitioner suggests any sound reasons for issuance of a writ of certiorari. Petitioner in No. 778 tries to show a "conflict" between the lower court's decision in this case and its prior opinion in *American Airlines, Inc.* v. *Civil Aeronautics Board*, 231 F. 2d 483 (C.A.D.C). That case involved a temporary experiment in the carriage of first class mail by air, in which the applicants for exemption would not have been able to join if they had been required to await completion of a certification proceeding. The Court of Appeals thought the findings in that situation, which were directly addressed to the question of exemption and were more specific than in the instant case, sufficient to show the basis for the finding of "unusual circumstances". 231 F. 2d, at 487. Judge Prettyman, who wrote both the opinion in the instant case and the concurring opinion in that one, obviously did not believe that they were in conflict. (See Petition, No. 779, pp. 14a-15a).

Petitioners strain to find "important questions of Federal law" which they erroneously assert that the court below decided. Thus in No. 778 it is said that the operating authority of the supplemental carriers "is at stake" (Petition, p. 10); that the lower court held that the Board should not regulate these carriers by the exemption process (*id.*, p. 14); and that the lower court "lost all interest in the fate of the group of supplemental carriers" (*id.*, p. 18). No. 779 states that the lower court ruled that the Board has "no authority to grant supplemental operating rights to a number of small airlines" (Petition, p. 16). The lower court neither said nor held any of these things. Its conclusion was simply "that the case must be remanded in order that the Board may make findings to support the conclusions which the statute makes necessary to the exercise of the exemption power" (Petition, No. 779, p. 14a). Since the pre-existing operating authority of the irregular carriers, under which they had been operating for many years, was neither in issue before the lower court nor in any way curtailed by its decision, it is apparent that these statements in the petitions are quite without basis.

3. The petition in No. 779 states that there is also presented a question of failure to exhaust administrative remedies. (Petition, pp. 3, 15-16). It is true that the Board retained power to revise downward the ten-flight limitation if, in practice, that authority proved excessive. The petitioner here made some argument below to the effect that the exemption order could not be reviewed by the court absent a showing that the petitioners to the lower court had first requested revision downward of this ten-flight limitation. But the fact that the Board may, at some later stage, retract or reduce these operating privileges does not make the order itself non-reviewable. If it did, an agency could always

defeat judicial review by reserving power to amend or modify its actions. Furthermore, one of the petitioners to the lower court had already requested the Board to take action to revise downward the permissible flights, and the Board, in response to this request, had held it to be "premature". (R. 49207).

4. The non-final nature of the decision below is sufficient reason for denying certiorari. The decision below is non-final in the sense that it has not ended the "litigation by fully determining the rights of the parties, so that nothing remains to be done" by the Board except some purely ministerial act. *Gospel Army* v. *Los Angeles,* 331 U.S. 543, 546. As petitioners themselves point out in their motion to defer consideration of their petitions for certiorari, "the Board may make additional findings of fact which will satisfy the opinion of the United States Court of Appeals for the District of Columbia Circuit, dated July 19, 1956, and thereby render moot one of the principal issues raised in the Petitions for Certiorari." Other avenues of action are available to the Board; it may make entirely different findings, or it may decide to make no new findings as to temporary authorization but await completion of the proceeding and dispose of the applications of the supplemental carriers finally on the merits of each individual applicant's case. This Court should not burden itself unnecessarily with matters which are in such a posture. *American Construction Co.* v. *Jacksonville T. & K. R. Co.*, 148 U.S. 372.

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The petitions for certiorari should be denied, for the questions presented are neither substantial nor sufficiently important for this Court's attention.

**B. Opposition to motion to defer consideration.**

The petitioners have moved to defer consideration of their petitions until after the final decision of the Board in the main Investigation. They point to the fact that a stay of the judgment below has been granted until that time, that the final decision of the Board may or may not moot the decision below, and that oral argument before the Board is expected shortly after March 11, 1957. Since the filing of their petitions the dates for the filing of briefs before the Board and for oral argument have been postponed until the newly appointed member has been confirmed.

Since petitioners have established no possible grounds for the granting of their petitions for certiorari, the motion to defer consideration should be denied. Petitions without merit should not be left standing to serve as a cloud on Board proceedings now in progress.

Furthermore, the decision below will necessarily guide the Board in its findings as to any further exemptions which may be considered in the Investigation, either further interim exemptions or exemptions of a more permanent nature. To defer passing on the petitions for writ of certiorari would prolong uncertainty as to the ultimate status of the lower court's decision, thus adding a further measure of uncertainty to a Board proceeding already plagued by complications.

## CONCLUSION.

For the above reasons the petitions for certiorari and the motion to defer consideration thereof should be denied.

Respectfully submitted,

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